IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.S.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

THURSDAY, THE 7TH JUNE 2007 / 17TH JYAISHTA 1929

WA.No. 1635 of 2006(D)
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AGAINST THE JUDGEMENT IN OP.7503/2001 Dated 05/04/2006
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APPELLANT: IST RESPONDENT
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THE KERALA PUBLIC SERVICE COMMISSION,
REPRESENTED BY ITS SECRETARY, OFFICE OF THE
KERALA PUBLIC SERVICE COMMISSION,
THIRUVANANTHAPURAM.

BY ADV. SRI.P.C.SASIDHARAN, SC, KPSC

RESPONDENTS: PETITIONERS & RESPONDENTS 2 TO 10
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1. DR.S.ANITHA, LECTURER IN OPHTHALMOLOGY,
MEDICAL COLLEGE HOSPITAL, THIRUVANANTHAPURAM.

2. DR.V.SUDHA, LECTURER IN OPHTHALMOLOGY,
MEDICAL COLLEGE HOSPITAL, THRISSUR.

3. DR.BIJU JOHN.C., LECTURER IN
OPHTHALMOLOGY (RIO), MEDICAL COLLEGE HOSPITAL,
THIRUVANANTHAPURAM.

4. STATE OF KERALA, REPRESENTED BY
ITS CHIEF SECRETARY, SECRETARIAT,
THIRUVANANTHAPURAM.

5. THE DIRECTOR, DIRECTORATE OF MEDICAL
EDUCATION, THIRUVANANTHAPURAM-11.

6. DR.SETHU LEKSHMY.S.,
LECTURER IN OPHTHALMOLOGY, MEDICAL COLLEGE,
ALLEPPEY.

7. DR.MALLIKA.O.U., LECTURER IN OPHTHALMOLOGY, MEDICAL COLLEGE, THRISSUR.

8. DR.PRAVEEN.C.P., LECTURER IN OPHTHALMOLOGY, MEDICAL COLLEGE, THRISSUR.

9. DR.SHAMLA.T.A., LECTURER IN OPHTHALMOLOGY, MEDICAL COLLEGE, THRISSUR.

10. DR.REMA DEVI, LECTURER IN OPHTHALMOLOGY, MEDICAL COLLEGE, ALLEPPEY.

11. DR.ARUN KUMAR.A., LECTURER IN OPHTHALMOLOGY, MEDICAL COLLEGE, CALICUT.

12. DR.DILEEP KUMAR.K.V., LECTURER IN OPHTHALMOLOGY, MEDICAL COLLEGE, KOTTAYAM.

BY ADV. SRI.M.V.AMARESAN
SRI.V.N.RAMESAN NAMBISAN
GOVERNMENT PLEADER
SRI.PIRAPPANCODE V.SREEDHARAN NAIR
SRI.PIRAPPANCODE V.S.SUDHIR
SRI.SOORAJ T.ELENJICKAL

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 25/05/2007, ALONG WITH WA NO. 1642 OF 2006 THE COURT ON 07/06/2007 DELIVERED THE FOLLOWING:

K.S. RADHAKRISHNAN & ANTONY DOMINIC, JJ.

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Writ Appeal Nos 1635 and 1642 of 2006

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Dated: 7th June, 2007

JUDGMENT

Radhakrishnan, J.

We are in these cases called upon to examine the correct interpretation of Rule 15(a), (b) and (c) and the two provisos thereto of the Kerala State and Subordinate Services Rules, in the context of appointment to the post of Lecturer in Opthalmology in the Medical Education Department. Learned Counsel appearing for the Public Service Commission as well as the contesting candidates submitted that the learned single judge on a wrong interpretation of the second proviso to Rule 15 (c) as well as on a misunderstanding of the facts held that the benefit of temporary pass over having gone to open competition candidates, the communities which lost the benefit in the process need not be compensated.

2. Learned counsel for the Public Service Commission submitted that the learned single judge has failed to consider the

distinction between No Candidate Available (NCA) turn and the temporary passing over (TPO) turn and reached a wrong finding that the TPO turn if it has gone to open competition candidate, need not be restored. Counsel submitted that the finding of the learned single judge that "the moment the benefit of temporary pass over goes to open competition, the turn against the original pass over withers away" is incorrect, and is a complete misreading of the rules. Counsel submits that the rule never postulates such a situation and the finding of the learned judge to that extent is faulty and incorrect. Counsel also submitted that the learned single judge has not properly appreciated the scope of the provisos to Rule 15 (a) and 15 (b).

3. Counsel appearing for the appellant in W.A. No 1642 of 2007 submitted that it was made clear in the counter affidavit filed by the P.S.C that the turn available to reservation community was not lost to them if required number of reservation candidates are not appointed to maintain the 50% reservation in that recruitment year. Counsel submitted only in a case where open candidates were appointed due to absence of reservation candidates in the rank list, second proviso to Rule 15 (c) would apply. Learned counsel appearing for the writ petitioners supported the reasoning of the

learned single judge and submitted that the benefit of temporary pass over having gone to open competition candidates, the community which lost the benefit in the process need not be restored in view of the second proviso to Rule 15 (c).

4. We may examine the rival contentions in the light of the relevant rules which are extracted hereunder for easy reference.

> "15 (a). The integrated cycle combining the rotation in clause (c) of rule 14 and the sub-rotation in sub-rule (2) of rule 17 shall be specified in the Annexure to this Part. If a suitable candidate is not available for selection from any particular community or group of communities specified in the Annexure, the said community or group shall be passed over and the post shall be filled up by a suitable candidate from the community or group of communities immediately next to the passed over community or group in the said Annexure in the order of rotation. <u>If no suitable candidate is available for selection in any of the above communities or group of communities, selection shall be made from open competition candidates.</u>
>
> (b) If a suitable candidate is not available for selection from the group of communities classified as 'scheduled castes' in the turn allotted for such a group in the Annexure the said group shall be passed over and the post shall be filled up by a suitable candidate from the group of communities classified as "scheduled tribes" and vice-versa. If no suitable candidate is available for selection in any of the two groups classified as "scheduled castes or scheduled tribes" selection shall be made from among the communities immediately next to the group of communities entitled to be appointed according to the turn allotted in the Annexure in the order of rotation. <u>If no suitable candidate is available for selection in any of the communities or group of communities selection shall be made from open competition candidates.</u>

(c) The benefit of the turn forfeited to a particular community or to a group of community by reason of it being passed over under sub rules (a) and (b) shall be restored to it, at the earliest possible opportunity, if a suitable candidate from that particular community or group is available for selection by making adjustment against the claims of the particular community or group that derived the extra benefit by reason of such passing over;

Provided that in no year reservations including carrying forward vacancies to a category of post shall exceed 50% of the total number of vacancies for which selection by direct recruitment to that category is resorted to in that year;

Provided also that the said right of restoration shall not extend to a case where the selection has gone to an open competition candidate.

Note: For purposes of application of the proviso limiting the number of vacancies to be reserved in a year as 50 per cent in respect of recruitment to a category of post, the period of one year shall commence on and from the day on which the ranked list of candidates prepared by the commission in respect of that post comes into force;

Provided that in regard to ranked lists brought into force prior to 13.6.1975 and remaining valid the year of reservation shall continue to be one year from the 15th June, 1974."

Public Service Commission invited applications for appointment to the post of Lecturer in Opthalmology in Medical Education Department as per gazette notification dated 23.04.1996. Rank list

was published by the commission on 13.12.1999. Main list consisted of 83 candidates and the supplementary list consisted of 20 candidates. At the time of finalisation of the current rank list, there were 26 vacancies available for the post and the Commission had advised equal number of candidates for being appointed after following the rules of reservation and rotation. Writ petitioners were included in the rank list and assigned rank numbers 1, 2 and 3 respectively. At the time of finalisation of the rank list six existing TPO turns to keep up 50% rule in the previous selection had to be made by advising candidates from the current rank list. Due to TPO, there was a break in the chain in the cycle of rotation and the break was set right by advising six candidates first before continuing the regular rotation from the turn where it stood in the previous list. The details of the turns kept pending due to the temporary passing over of turns to keep 50% ceiling are as follows:

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|---|---|
| 1. MRI 42 E | - TPO on 17/09/1991 |
| 2. MRI 42 E | - TPO on 22/08/1992 |
| 3. MRI 44 ST | - TPO on 22/08/1992 |
| 4. MRI 46 M | - TPO on 20/09/1993 |
| 5. MRI 48 OX | - TPO on 20/09/2003 |
| 6. MRI 50 D | - TPO on 21/03/1995 |

The details given above would show that six different turns shown

above were temporarily passed over at the time of previous selection and while filling up 26 vacancies from the rank list in question. Those six turns had to be filled up first according to rules of reservation. The main rotation which stood at MRI 51 open competition had to be continued from MRI 52 SC when selection was made from the present rank list. Necessarily these six TPO turns had to be filled up first and the details of the candidates advised against the six turns are given in paragraph 7 of the counter affidavit filed by the Public Service Commission. After providing the six turns, writ petitioners were advised against their turns under MRI 53 OC, MRI 55 OC and MRI 57 OC. Writ petitioners were included in the rank list as open competition candidates and those open competition vacancies could be filled up only after filling up the six TPO turns. Backward class turn MRI 52 SC was satisfied after filling up open competition candidate turn in the respective point. So the petitioners' seniority came below the seven candidates. Writ petitioners were advised against open competition turns and those open competition turns could be filled up only after filling the TPO turns. The learned single judge has interfered with the decision of the P.S.C after having felt that the community which lost the benefit in the earlier process need not be restored since the benefit of

temporary passing over was given to open competition candidate in view of the second proviso to Rule 15 (c).

5. We are of the view, learned single judge has not properly appreciated the legal and factual aspects and came to a wrong conclusion. Learned single judge, in our view, has not properly appreciated the distinction between compensation to community candidate on the basis of the extra benefit derived by a community due to non availability of a particular community candidate and temporary passing over of community turn to keep 50% rule (TPO). If this distinction was borne in mind, in our view, learned single judge would not have held that the benefit of passing over would have gone to open competition candidate and the community which lost the benefit in the process need not be restored the same under the second proviso to Rule 15 (c). We make it clear this is not a case in which open competition candidates have got any benefit in the absence of candidate at the reservation turn and in that case, second proviso to Rule 15 (c) would apply. If only in the integrated cycle a post reserved for reservation community could not be filled up by another from the reserved community and it was allotted to an open candidate the reservation is not possible under the second proviso to Rule 15. Rule 15 deals with two situations; one is where a

turn is forfeited to a particular community or to a group of communities by reason of it being passed over due to non-availability of candidates of that community and selection is made from open candidates and other temporary passing over the turn to keep 50% rule and in which case the benefit has to be restored to them. Merely because of the reason that a community turn is passed over to keep 50% rule that turn will not be forfeited. First proviso specifically states one year reservation including carry forward vacancies to a category of post shall exceed 50%. In such a situation the reserved communities would not forfeit their chance and have to be compensated unlike the case when vacancies could not be filled up due to non-availability of candidates and hence were filled up by open candidates. This is the purport of the Rule 15(a), (b) and (c) and the provisos.

6. In the instant case the compensation was due to temporary passed over turns to keep 50% rule. The principle as stated by the learned single judge would apply only in a case where reserved community has not been given their turn due to non availability of candidates and those vacancies were filled up by general candidates. No case was pleaded in the writ petition that in the previous selection reservation available to reserved candidates was

given to open merit candidates for want of reserved candidates and on the other hand compensation was due to temporary passed over turns to maintain 50% rule. In the previous selection the turn available to reserved community was not lost due to absence of reserved candidates but lost to them so as to maintain 50% rule. The finding of the learned single judge, in our view, is without any legal basis and is only to be reversed.

7. Public Service Commission, in our view, has correctly applied the reservation principle. Facts of this case would indicate that this is not a case where reservation communities were not given their due turn due to absence of reservation candidates and the turns were filled up by open merit candidates, but due to the application of 50% rule. Learned judge has therefore committed an error in holding that the benefit of pass over having gone to open competition candidates the community which lost the benefit in the process need not be restored in view of the second proviso to Rule 15 (c). Counsel appearing for the writ petitioners however submitted that the P.S.C did not maintain the 50% rule in the present selection. Reference was made to Ext P12. Counsel for the P.S.C has submitted that the P.S.C is strictly following the second proviso to Rule 15 (c) as well. This submission is recorded. The writ appeals

are allowed and the judgment of the learned single judge would stand set aside.

Sd/-

K.S. RADHAKRISHNAN
Judge

Sd/-

ANTONY DOMINIC
Judge

07/06/2007

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